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No. 83-165

In The

Supreme Court of the United States

October Term, 1983

YORK INTERNATIONAL and YORK DIVISION, BORG-WARNER CORPORATION,

Appellants,

vs.

ALABAMA OXYGEN COMPANY, INC. and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA,

Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

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PARENT COMPANIES AND AFFILIATES

As of the date of this filing, Alabama Oxygen Company, Inc., is a wholly-owned subsidiary of Tennessee Natural Resources, Inc. TNGL Reorg. Corp. is also a wholly-owned subsidiary of Tennessee Natural Resources, Inc. Tennessee Natural Resources, Inc., is a wholly-owned subsidiary of Tennessee Natural Gas Lines, Inc. Nashville Gas Company and Tennessee Oxygen Company, Inc., are also wholly-owned subsidiaries of Tennessee Natural Gas Lines, Inc.

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Appellants,

vs.

ALABAMA OXYGEN COMPANY, INC. and THE INDUSTRIAL DEVELOPMENT BOARD OF THE CITY OF BESSEMER, ALABAMA,

Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Appellees move the Court to dismiss this appeal on the grounds that the appeal is not within this Court's jurisdiction and does not present a properly raised substantial federal question expressly passed on by the Court below. Sup. Ct. R. 16.1 (a), (b), and (d).

ARGUMENT

A. This Appeal Is Not Within The Jurisdiction Of The Court As Conferred By 28 U.S.C. § 1257 (1) And (2).

Appellees move to dismiss this appeal on the ground that the appeal is from a decision of the Alabama Supreme Court which is not a final judgment, which does not declare invalid a statute of the United States, and which does not declare valid a state statute in face of a challenge on federal grounds.

The basis for this motion to dismiss is more easily explained in the context of an accurate representation of the decision from which this appeal is taken.[1] As shown below, Appellants mischaracterize the decision below in an effort to invoke the appellate jurisdiction of this Court.

The controlling issue addressed by the Court was one of choice of law:

> The dispositive issue presented for decision by this Court is whether the trial court erred in choosing to apply federal rather than state law and, in the alternative, New York rather than Alabama law.
>
> 17 A.B.R. at 2035 (A-4).

Only the Court's decision with respect to the choice between federal and state law is challenged on this appeal. To this issue the Court held as follows:

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[1]The decision below will be reported at 433 So. 2d 1158. As of the filing of this Motion Counsel for Appellees had not received this volume of the Southern Reporter advance sheets. For this reason citations to the opinion will be to the opinion as it appeared at 17 A.B.R. 2036 and in the Appendix to Appellants' Jurisdictional Statement; to-wit, 17 A.B.R. — (A—).

> We conclude that the trial court erred in holding that Alabama law and public policy do not apply in this case.
>
> 17 A.B.R. at 2050 (A-17).

Careful analysis of the Court's decision shows clearly that the basis of its decision was its interpretation of the intent of Congress in passing the Federal Arbitration Act,[2] and not the validity or invalidity of any federal or state statute. The question was not whether the Act of Congress was valid or invalid, but rather to what the Act was intended to apply:

> Our first inquiry is whether Congress . . . has prohibited state regulation of the aspect of commerce involved here.
>
> 17 A.B.R. at 2036 (A-5).

The Court concluded that Congress has not prohibited the questioned state action:

> The wording of the Act and its legislative history indicate a desire by Congress to create a law only applicable in federal courts in diversity cases.
>
> 17 A.B.R. at 2037 (A-6).

This is the holding of the court below. The Federal Arbitration Act is not held to be invalid, but rather is correctly interpreted, through its language and its history, not to extend to prohibit regulation of arbitration by a state.

It is true that the decision from which this appeal arises discusses the authority of Congress to so regulate

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[2] 9 U.S.C. § 1, *et seq.*

the state under the Commerce Clause[3] and the Tenth Amendment[4] to the United States Constitution. This discussion, however, is dictum, and is plainly presented as such. Part IV of the opinion is the portion in which the court's holding is explained. 17 A.B.R. at 2035-2049. The introduction to Part IV, 17 A.B.R. at 2035-2036, specifies that the court's interpretation of the Arbitration Act, as discussed above, is the basis of its holding, and that its discussion of the issues raised by the Commerce Clause and the Tenth Amendment are discussions of a hypothesis found not to exist:

> A review of the Act and its legislative history leads us to the conclusion that we would be remiss in interpreting it as applicable in Alabama. We believe the Supreme Court, upon full consideration of the issues, would not so hold. Further, we are of the opinion the Act, if construed as applicable to the states, presents serious constitutional questions.
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> 17 A.B.R. at 2036 (A-5).

This point is more clearly evidenced by the conclusion of Part IV(A) of the opinion and the introductory sentence of Part IV(B) which immediately follows:

> We cannot, in light of the substance of the Act and its legislative history, conclude that Congress has, either explicitly or implicitly, ordained that the Federal Act preempt state law.
>
> B.
>
> Had the F.A.A. ordained that state law was to be preempted by the Act, we would be compelled to

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[3]U.S. Const. art. I, § 8, cl. 3.

[4]U.S. Const. amend. X.

consider its constitutionality in light of the Commerce Clause and the Tenth Amendment.

17 A.B.R. at 2039 (A-8).

That the interpretation of the Act was the Court's holding, and that the discussion of the Commerce Clause and the Tenth Amendment was mere dictum is further evidenced by the concurring and dissenting opinions below. The *sole* issue addressed in the concurrence of Justice Shores, in which Justice Jones joins, is that of interpretation of the Act:

> I can find nothing to convince me that the Congress has preempted state law in this area. I am convinced to the contrary and find support for this position in the legislative history of the Federal Arbitration Act quoted by Justice Black in his opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, [388 U.S. 395 (1967)], and, while his opinion was a dissenting one, his dissent was not on this point, and what he said on this point goes unchallenged by the Supreme Court through *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, supra, [103 S. Ct. 927 (1983)], decided February 23, 1983. I quote Justice Black from *Prima Paint:*
>
> > "[T]here are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts [*] . . . .
> >
> > "[*] See, e.g., Cohen & Dayton, [The New Federal Arbitration Law, 12 Va. L. Rev. 265 (1926)] at 277; Committee on Commerce, Trade & Commercial Law, [The United States Arbitration Law and Its Application, 11 A.B.A.J. 153] at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States

> to enact similar laws, Joint Hearings [on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess.], at 28, but Mr. Cohen assured Congress:
>
> "'Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States. * * * [The] question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.' Id., at 39-40."

87 S. Ct. at 1814.

17 A.B.R. at 2052 (A-18).

Similarly, the *sole* issue addressed in the dissent of Justice Maddox, in which Chief Justice Torbert joins, is the interpretation of the Act. 17 A.B.R. at 2053-2066. Neither of these opinions addresses the majority's dictum relating to the Commerce Clause and the Tenth Amendment.

As is apparent from this analysis of the opinion below, Appellants have mischaracterized the court's decision. The court does not hold "the Federal Arbitration Act, as applied to suits in state courts, unconstitutional", as is repeatedly suggested in the Jurisdictional Statement. Jurisdictional Statement, pp. 1-2, 6-11. The court simply held that the Act, by its terms and intent, did not apply to this situation.

The basis for this Motion to Dismiss becomes apparent when the holding below is correctly characterized. This appeal falls within neither 28 U.S.C. § 1257 (1) nor

(2). The Supreme Court of Alabama has not decided against the validity of the Federal Arbitration Act, so § 1257 (1) is inapplicable. The Act is valid; the Court simply holds that, by its terms and by the intent of its authors, it does not extend to prohibit application of state-law public policy considerations. Additionally, no state statute has been questioned as being repugnant to any law of the United States, so § 1257 (2) is inapplicable. Although the action taken by the Court below was in conformity with an Alabama statute, that statute was not challenged by Appellants.[5] The Court below dealt with the interpretation of the Federal Arbitration Act, not the validity of any Alabama statute.

A further ground for dismissal arises from the fact that the decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257. Appellants make the blanket assertion that the issue of the applicability of the Federal Arbitration Act to these facts has been finally determined and "is not subject to further review in the courts of Alabama". Jurisdictional Statement, p. 2. This is inaccurate.

This appeal is from a conditional grant of a Petition for Writ of Mandamus. The trial court subsequently dissolved the stay it had previously entered. Entry of the stay was not an appealable order under Alabama law, *Baltman v. Palm Oil & Supply Co.*, 88 So. 30 (Ala. App. 1920), nor would denial of the stay have been appealable. The action of the trial court in entering, denying, or dis-

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[5]The statute involved is merely reflective of the common law public policy of the State of Alabama, *Wells v. Mobile County Bd. of Realtors*, 387 So. 2d 140 (Ala. 1980), and was discussed by the Court below only in that context.

solving a stay would be reviewable by appeal upon entry of a final order in the case. In this instance, Appellants have the right to appeal the trial court's dissolution of the stay at the conclusion of this case.

Not only do Appellants have the right to appeal this issue to the Supreme Court of Alabama, the fact that the Supreme Court has previously ruled on the issue in the same case does not prejudice Appellants in any subsequent appeal. Through a statute apparently unique to Alabama, the "law of the case" has been abrogated and the Supreme Court is compelled to consider any subsequent appeal "without regard to such former ruling on the law by it." *Code of Alabama* § 12-2-13 (1975). Should the Court determine in a subsequent appeal that its ruling in this case was in error, it would be compelled to overrule this decision. *Elmore County v. Tallapoosa County*, 222 Ala. 147, 131 So. 552 (1930); *Booker v. Booker*, 225 Ala. 626, 144 So. 870 (1932). Clearly the issues raised by Appellants in opposition to Appellees' Petition to the Supreme Court of Alabama is subject to further review by that Court through appeal at the conclusion of the case.

Although Appellants cite cases which evidence an expanded "penumbral area" in the concept of finality, they are unable to cite any case which holds that this appeal is from a judgment that is final within the meaning of 28 U.S.C. § 1257.

B. This Appeal Does Not Present A Properly Raised Substantial Federal Question Expressly Passed On By The Court Below.

The true issue upon which Appellants seek review is whether the Federal Arbitration Act is intended to apply

to state courts, for it was the Alabama Supreme Court's holding on this issue which resulted in a ruling adverse to Appellants' position. The issue, however, cannot be so simply stated for purposes of making an appeal to this Court, for such an issue falls without this Court's jurisdiction. The issue of construction of federal law, as opposed to the constitutionality of that law, provides no basis for appeal to this Court. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 290 (1958).[6] Appellants have found it necessary, therefore, to assert other issues in an attempt to bring the case within permissible grounds for appeal:

> 1. Is this Court's holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* [103 S. Ct. 927 (1983)] that state courts are obligated to follow and apply the Federal Arbitration Act mere "dicta" which a state court is free to ignore if it concludes that the Federal Arbitration Act is repugnant to state law regarding arbitration?
>
> 2. Does Congress have the authority under the Commerce Clause to make the Federal Arbitration Act Applicable to a state court suit in which the plaintiffs' claim is based on a contract admittedly involving a transaction in interstate commerce?

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[6]Although the Court in *Ivanhoe* found no basis for an appeal, certiorari was granted. In their Jurisdictional Statement, p. 2, n. 3, Appellants suggest that their appeal be deemed a Petition for Certiorari should an appeal be inappropriate. No grounds are cited, nor is any argument made, however, which would support a grant of certiorari in this case. Appellants make no attempt to set out the considerations which might support a grant of certiorari, as required by Sup. Ct. R. 17.1. To the contrary, as discussed *infra*, Appellants mischaracterize the opinion below and structure the issues upon which they seek consideration in an obvious and strained effort to fall within the appellate jurisdiction provided in 28 U.S.C. § 1257 (1) and (2). Our discussion, *infra*, of the issues of finality and lack of a substantial federal question indicates that a grant of certiorari is not warranted in this case.

> 3. Does the Federal Arbitration Act, as applied to suits in state courts, violate the Tenth Amendment to the United States Constitution?
>
> Jurisdictional Statement, p. i.

That the second and third of these questions do not warrant consideration is most easily addressed. These issues simply are not presented by this appeal.[7] As discussed above, pp. 2-7, these issues were addressed by the Supreme Court of Alabama only in the context of a hypothesis found not to exist. Although the Court made clear its view on these issues in the abstract, its view did not constitute the holding in this case.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.
>
> *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

The basis for the Court's decision was independent of either of the second or third issues. Were this Court to find that the Commerce Clause and the Tenth Amendment permitted Congress to regulate state action regarding arbitration, such a finding would not alter the holding of the court below: that Congress, in fact, did not so regu-

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[7]The Jurisdictional Statement does not comply with Sup. Ct. R. 15.1 (g) in that it does not, and indeed cannot (since they were not raised), state when these issues were raised below, how they were raised, and how they were resolved. At best, Appellants' argument below was that federal rights prevented application of a state statute. This argument is insufficient to support an appeal. *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256 (1920).

late. What better argument that an issue is unsubstantial could be made than that resolution of the issue would not alter the ruling from which an appeal is sought.

The first question raised by Appellants, whether certain language in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927 (1983), is holding or dictum is similarly unsubstantial.[8] Not only is the questioned language dictum, but the case is inapposite to that on appeal. In *Moses H. Cone, supra,* this Court was asked to review the reversal of a decision of a United States District Court by a United States Circuit Court of Appeals. 103 S. Ct. at 933. No action of any state court was before this court for review. At issue was the decision of the federal District Court to stay an action due to the pendency of parallel litigation in a state court. 103 S. Ct. at 935-6. No state court was being asked to apply the Federal Arbitration Act. Had that issue been raised, which it was not, the relevant state law to be considered was totally opposite that of Alabama in that it presented no public policy against agreements to arbitrate future disputes. 103 S. Ct. at 943, n. 36. The decision in *Moses H. Cone, supra,* is distinguishable from the instant appeal in all respects-factual, procedural, and substantive.

For more than 140 years the public policy of the State of Alabama has looked with strong disfavor on agreements to arbitrate future disputes. *Bozeman v. Gilbert,* 1 Ala. 90 (1840). The Constitution of Alabama guarantees to the citizens of Alabama the right to seek redress in the

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[8]The issue is one of *construction* of federal law, not its *constitutionality,* and thereby provides no basis for appeal. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 290 (1958).

Courts of the state for any wrong suffered. *Alabama Constitution* § 13 (1901). The public policy here at issue preserves that right. Perhaps Alabama stands alone, or in a minority, in providing its citizens with this guarantee —that its courts shall always be open to them when they are wronged.[9] If this is true, the decision on appeal will have a minimal effect throughout our country. Such being the case, enforcement of these rights should be left to the local courts charged with their preservation. The plenary review of this Court should be reserved for those cases of national import.

The final ground supporting the proposition that the appeal presents no substantial federal question is that the issue decided by the Court below was correctly decided. It is in conflict with no decision of this Court or any other state court of last resort or federal court of appeals. The language of the Act and its legislative history evidence clearly that § 3 of the Act is limited in its application to the federal courts and not be forced on an unwilling state court having inconsistent public policy. Perhaps it was hoped that the Act would "have the beneficial effect of encouraging States to enact similar laws", but it was

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[9]Appellants do not suggest that the public policy of Alabama which was at issue in this case is present in any other jurisdiction. Justice Maddox in his dissent, below, 17 A.B.R. at 2053-2066 (A-19-33), suggests that almost all states have a public policy consistent with the Federal Arbitration Act, not opposed to it. He notes that all but a few states have adopted the Uniform Arbitration Act. 17 A.B.R. at 2065-6 (A-32). The decision of the Alabama Supreme Court in this case is not in conflict with the decision of any other state or federal courts which do not face the public policy consideration present in Alabama.

clearly not intended to "infringe upon the provinces or prerogatives of the States."[10]

CONCLUSION

For the reasons stated above, this appeal should be dismissed.

Respectfully submitted,

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[10] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Mr. Justice Black, dissenting, 87 S. Ct. at 1814, quoting the Joint Hearings on S. 1005 and H. R. 646 before Subcommittees of the Committees on the Judiciary 68th Cong., 1st Session.